FOR ARGUMENT

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In the Supreme Court of the United States

GUY MITCHELL, ET AL., PETITIONERS,

v.

MARY L. HELMS, ET AL., RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONERS

MICHAEL W. MCCONNELL
STEFFEN N. JOHNSON
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

PATRICIA A. DEAN
Counsel of Record
ANDREW T. KARRON
JOHN C. MASSARO
Arnold & Porter
555 12th Street, N.W.
Washington, D.C. 20004
(202) 942-5000

Counsel for Petitioners

23PP

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REPLY BRIEF FOR PETITIONERS

In the Argument section of this brief, we will discuss the question of constitutional law on which this Court granted certiorari. But respondents' brief consists in large part of *factual* argument, based on out-of-context snippets from the record, culminating in their conclusion that the "safeguards in use in Jefferson Parish during this period [the early 1980s to 1989] were woefully inadequate to prevent the use of Chapter 2 materials in sectarian instruction." Resp. Br. 47. Respondents neglect to point out that this conclusion was explicitly *rejected* by the district court as unsupported by evidence sufficient to withstand summary judgment. See Pet. App. 107a (describing program safeguards and concluding that they "are sufficient to prevent Chapter 2 benefits from being diverted to religious instruction"). That finding was undisturbed by the court of appeals, which reversed on the basis of a categorical theory of school aid that has nothing to do with the presence or absence of "safeguards." Pet. App. 70a-71a.

Respondents do not assert that the district court misapplied summary judgment standards, and they do not (explicitly) ask this Court to review the record de novo. They simply ignore the fact that the district court found their interpretation of the evidence unsupportable. Because so much of their brief is premised on this attempt to relitigate the facts, we will address their factual claims before turning to the legal issues.

REPLY TO RESPONDENTS' STATEMENT OF THE CASE

A comparison of respondents' claims with the record evidence they cite shows that their factual arguments are based almost entirely on speculation, presumption, and unwarranted inference. Even after conducting some four years of discovery, respondents can identify no evidence that the Chapter 2 materials were misused (other than the few isolated incidents we discussed in our opening brief). The following are among the more significant examples:

A. Signed Assurances. Each and every nonpublic school whose students participate in the Chapter 2 program must certify in writing that any Chapter 2 materials "will only be used for secular, neutral and nonideological purposes." J.A. 261. Respondents are mistaken in contending that the Louisiana state official charged with oversight of the program admitted that these written

assurances are "only a statement of good intent and that the state had not attempted to enforce such assurances." Resp. Br. 4. What the official actually said was that all schools "must sign" the assurances (J.A. 120); that "all, to my knowledge, of our nonpublic schools that participate in the program are willing to sign these assurances" (*id.* at 121-122); that the assurances are enforced both "as we review the application" (*id.* at 103), and again "[t]hrough the monitoring process" (*id.* at 94, 103); and that the State could terminate participation of any school found not to comply with the assurances (*id.* at 123). Thus, the record evidence concerning the operation of the program as of the close of the record in 1989 *refutes* respondents' assertion that the responsible state officials have "not attempted to enforce [the] assurances."[1]

B. Pre-Screening of Material Requests. Prior to the loan of any Chapter 2 materials, public school officials receive applications providing a detailed description of what materials are sought and the particular use that will be made of these materials. See, *e.g.*, J.A. 244-245, 248-249. Respondents are therefore simply wrong in asserting that "the nonpublic schools themselves decide what equipment and books they want, and the nonpublic school then orders those items from the suggested vendors." Resp. Br. 5. Public employees are in charge of screening and approving all materials to be loaned to children attending nonpublic schools.

C. Pre-Screening of Library Books. As the district court noted (Pet. App. 107a), public employees prescreen all requests for library books to ensure that only secular books are ordered. At the close of discovery in 1989, this review consisted of an examination of library book titles at the time of ordering and a spot check of book contents during monitoring. That is how the mistaken purchase of religious books in 1982 was discovered and corrected. Pet. App. 91a; J.A. 130. Since this incident, the school district has exercised additional "caution * * * to insure that books and materials purchased are secular, neutral, and non-ideological." J.A. 130, 137. At present, this includes a review of a description, as well as the title, of the requested book. See Instructional

[1] Respondents rely upon testimony relating to old Guidelines that were superseded prior to the summary judgment briefing. See Pet. Br. 7 n.4.

Support Services Nonpublic Orientation Meeting, May 17, 1999 and completed assurance and application forms (lodged with Clerk). Respondents cite no instance in which a book prescreened by title turned out to be religious in nature, and this is highly unlikely, since in all cases in which there was an issue regarding appropriateness, the book was disapproved. J.A. 138. But even if a few religious books slipped through, in violation of the statute and regulations, this would not necessarily be a *constitutional* violation. Even public school libraries can, and do, contain some religious books.

Respondents contend that in 1992, long after the record closed on the Chapter 2 portion of this case, "St. Agnes School ordered and received" religious books. Resp. Br. 41. In fact, the very document cited by respondents indicates the opposite—the titles identified by respondent appear to have been requested but later were screened out and *not* delivered. See 4/12/95 Attachments to State Defendants' Response Regarding The Auditing of the Reimbursement of Required Cost Program and Request for Court Order, Exh. 6-2, at 29 (delivery ticket). Thus, the post-record evidence cited by respondents merely confirms that the pre-screening procedures operate as they are intended to operate.

D. Materials Loaned for Use by Students. Respondents claim that "[m]uch Chapter 2 aid was directed primarily for teacher instructional use as opposed to individual student use—such as overhead and movie projectors, tape recorders, projection screens, filmstrips and televisions." Resp. Br. 39; *id.* at 3 (citing Chief Judge Heebe's *vacated* factual findings in support).[2] They neglect to point out, however, that the Chapter 2 statute was amended in 1988 to eliminate authorization for the purchase of "instructional equipment * * * for use by children and teachers" (compare 20 U.S.C. § 3832(1)(B) (1982) with 20 U.S.C. § 2941(b) (1988)), and to provide explicit authorization for the acquisition of

[2] Respondents also refer to materials allegedly loaned by other Louisiana school districts—not Jefferson Parish—in support of this contention. Resp. Br. 3 n.10. The documents to which respondents refer are simply not part of this case, which is an as-applied challenge to the practices in Jefferson Parish. See J.A. 20.

computers and software. Respondents do not deny that computers, software, and library books—the principal uses of funds at the time of summary judgment, and today—are primarily for use by individual students. This aspect of their claim is therefore more than a decade out of date.

E. Recording and Reporting Use. A combination of monitoring and self-reporting ensures that Chapter 2 materials are used solely for statutory purposes. J.A. 140; see *id.* at 142-143 (describing monitoring process). Participating schools must maintain records of the use of all materials loaned under Chapter 2, and they must provide public officials a detailed "evaluation report" indicating how such materials are being used. See, *e.g.*, J.A. 256-259. Respondents repeatedly assail these reports, contending that "there [i]s no way * * * to know whether the equipment was *really* used for proper purposes." Resp. Br. 7 (emphasis added); see also *id.* at 4, 5, 6. Some of respondents' *amici curiae* are even more direct in making the accusation of bad faith. See Br. *Amicus Curiae* of Interfaith Religious Liberty Foundation, *et al.* 26 (stating that, unlike Seventh-day Adventists, "other pervasively religious schools may have no compunctions against" submitting false certifications). There is no record support for these accusations. After *four years* of discovery, respondents have never identified *a single instance* in which records were falsified or otherwise made inaccurate or misleading.[3]

F. Success of the Safeguards. As the district court observed, Pet. App. 91a, the local official in charge of the Jefferson Parish program testified that the materials and equipment are in fact used in accordance with the requisite Chapter 2 plan submitted prior to the loaning of any materials. J.A. 145. Respondents have identified no instance in which the statutory and regulatory structure broke down and resulted in the use of Chapter 2 materials for ideological

[3] The opportunities for ideological use of the technological equipment at issue here are limited. As some of respondents' *amici curiae* point out, "[p]rimary grade teachers who use technology for instruction, in fact, most often use it for language arts (90%) and math (90%)." Brief of *Amici Curiae* National School Boards Association, *et al.* 17-18 (citing EDUCATION WEEK).

purposes. For example, respondents state that "the Chapter 2 [audio-visual] materials" were used in all classes at nonpublic schools, including religion classes. Resp. Br. 36. But the evidence they cite for this proposition indicates nothing of the sort. Rather, it indicates only that unidentified "audio-visual materials"—a category that expressly includes materials *not* purchased with Chapter 2 funds—were used in classes at nonpublic schools. J.A. 108, 206. This is not evidence (and there is none) that Chapter 2 materials were used to teach religion in conflict with the statute and regulations.

Respondents similarly mischaracterize the facts in contending that library books bearing religious titles were ordered with Chapter 2 funds during 1986. Resp. Br. 41. In fact, the document to which respondents cite concerns book orders under a completely different program—not the Chapter 2 program. See 8/11/89 Attachments to Plaintiffs' Motion for Summary Judgment at Kropog Deposition, Exh. 5. The only other instance respondents can identify, the purchase of library books of a religious character in 1982, occurred long *before* the Guidelines at issue here were put into place. The fact that this mistake was uncovered in the normal course of monitoring merely demonstrates that program safeguards are effective in discovering and rectifying mistakes. See Pet. Br. 9.

ARGUMENT

I. RESPONDENTS' ARGUMENTS REQUIRE REJECTING THE CRITERIA SET FORTH IN *AGOSTINI* AND SUBSTITUTING CRITERIA THAT ARE INCONSISTENT WITH PRECEDENT.

In our opening brief (at 20-30), we showed that the Chapter 2 program in Jefferson Parish satisfies all three of the "primary criteria" set forth in *Agostini* "to evaluate whether government aid has the effect of advancing religion." *Agostini* v. *Felton*, 521 U.S. 203, 234 (1997). First, Chapter 2 does not "result in governmental indoctrination." *Ibid.* Any religious instruction that takes place in participating schools is a product of private decisionmaking; no materials supplied by the government have any religious or ideological content. Second, Chapter 2 does not "define its recipients by reference to religion." *Ibid.* All schoolchildren

receive equal benefits, without regard to the religious or nonreligious, public or private nature of their school. Third, Chapter 2 does not "create an excessive entanglement." *Ibid.* The nature of the aid is such that no intrusive surveillance or interference with the autonomy of the school is necessary to ensure that constitutional requirements are satisfied. Indeed, the entanglement is no more serious than that in *Agostini* itself.

Respondents fail to respond to any of this. Indeed, one searches their brief in vain for any serious discussion of *Agostini*'s three criteria. To be sure, they strive to distinguish *Agostini* on its facts (Resp. Br. 10-11, 28), and they assert that additional requirements should be added to the three criteria (*id.* at 31). But they make no attempt to dispute that the three criteria spelled out in *Agostini*, if applied to this case, would require reversal of the decision below. When this Court announces the legal principles that apply to a particular field of law, it presumably expects that litigants in future cases will frame their arguments accordingly. Respondents' failure to do so is tantamount to a confession of error.

Oddly, respondents assert that we "would like to focus on merely one of these principles, that of state neutrality toward religion." Resp. Br. 13; see also *id.* at 18 (suggesting that we treat "neutrality" alone as "dispositive"); *id.* at 32 (attributing to petitioners a "pure neutrality view"). Since we defend the rationale behind *all three* of the *Agostini* criteria, and show why we prevail under *all three* (see Pet. Br. 20-30), this claim is baseless.

Instead of addressing the *Agostini* criteria, respondents posit an alternative, two-part test of their own. According to them, the Establishment Clause prohibits: (1) "direct, non-incidental state aid to the primary educational mission of parochial schools"; and (2) "state aid that is sectarian or reasonably divertable to sectarian use." Resp. Br. i; see also *id.* at 11 (restating this two-part test in slightly different terms). But notably, respondents do not quote any decision of this Court announcing such a test. There is none. Respondents purport to divine this test as a means of reconciling and explaining this Court's various school aid decisions. But in this they are manifestly in error: both parts of their proposed test are squarely contradicted by this Court's precedents. Moreover, neither respondents' two-part test nor any of their other arguments

offers any relief from the risk of arbitrary line-drawing that plagues the approach of *Meek* and *Wolman*. See Pet. Br. 38-43. Indeed, respondents' "more nuanced and fact specific view" (Resp. Br. 14) is but a foray back into the "vast, perplexing desert of Establishment Clause jurisprudence" (Pet. App. 13a) of which the court of appeals complained, and from which *Agostini* offers a way out.

A. Respondents' Two-Part Test

The suggestion that all "direct, non-incidental state aid to the primary educational mission of parochial schools" is unconstitutional is flatly inconsistent with *Board of Education* v. *Allen*, 392 U.S. 236 (1968), a decision that this Court has repeatedly reaffirmed. See Pet. Br. 25 n.15 (citing cases). The textbooks in *Allen* were provided to the schools for classroom use, and there is no reason to say that this aid was any less "direct" than the provision of computers, software, and library books here.[4] Textbooks unquestionably constituted "non-incidental state aid to the primary educational mission of parochial schools." Resp. Br. i. See *Allen*, 392 U.S. at 245 (acknowledging that textbooks "are critical to the teaching process" and rejecting the argument that such aid is necessarily unconstitutional).[5] Moreover, this part of

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[4] Respondents' description of the facts in *Allen* is selective. They say that the books were "'furnished at the request of the pupil'" and that "[n]o 'funds or books' were 'furnished to the parochial schools.'" Resp. Br. 18. This ignores the fact that the actual requests for books were compiled by the religious schools and submitted by the schools to the State, and that the books were delivered to the schools and "store[d] on their premises." 392 U.S. at 244 n.6. Chapter 2 procedures are virtually identical.

[5] Respondents' test was also rejected by the Court in *Lemon* v. *Kurtzman*, 403 U.S. 616 (1971). There, the Court affirmed that the States are permitted "to provide church-related schools with secular, neutral, or nonideological services, facilities, or materials." *Id.* at 616. Indeed, we believe that *Meek* and *Wolman* are the only decisions not yet overruled that stated and relied upon the "no substantial aid" rule, and *Meek* and *Wolman* are distinguishable on other grounds. Pet. Br. 30-33. We find it surprising that respondents would continue to rely on *Aguilar* and *Ball*

respondents' test was explicitly repudiated in *Agostini*: "we have departed from the rule * * * that all government aid that directly assists the educational function of religious schools is invalid." 521 U.S. at 225. Respondents thus rely on a constitutional standard that was clearly rejected by this Court only two years ago.

The second part of respondents' test is whether state aid "is sectarian or reasonably divertable to sectarian use." Resp. Br. i. This supposed restriction apparently applies to "indirect" aid, since "direct" aid is foreclosed under respondents' first test. We agree that state aid must not be religious in content; that would violate *Agostini*'s prohibition on "governmental indoctrination." See Pet. Br. 23-24. But as to "divertability" (one of respondents' favorite terms), whether respondents are correct depends on the definition of the term, which they do not supply. If respondents mean only that some educational resources (like textbooks) can be examined to determine whether they are secular in content, and once examined will never change, while other resources (like teachers) cannot, Chapter 2 easily meets the standard. But respondents appear to use the term more broadly, to encompass resources that might conceivably be used in connection with classroom instruction that contains a religious element. That standard is not consistent with this Court's cases.[6]

(see Resp. Br. 14), which were overruled in relevant part by this Court in *Agostini*.

[6] Even so, we hasten to add that respondents have utterly failed to prove that Chapter 2 materials have been "diverted" to religious uses in any sense. See Pet. App. 107a (finding that the controls in Jefferson Parish "are sufficient to prevent Chapter 2 benefits from being diverted to religious instruction"). Their position, therefore, is not merely that religious uses are unconstitutional, but that pure speculation about the possibility of religious uses, unsupported by any evidence, is sufficient to hold a program unconstitutional. Cf. *Agostini*, 521 U.S. at 229 (criticizing dissent's reliance on "speculation * * * and not on any evidence in the record"). Respondents' approach is wholly inconsistent with the "presumption in favor of the constitutionality of statutes enacted by Congress" (*Bowen* v. *Kendrick*, 487 U.S. 589, 617 (1988)), which is particularly strong "when, as here, Congress specifically considered the question of the Act's constitutionality." *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981). See Pet. Br. 3-4 (summarizing legislative history).

In *Zobrest*, for example, this Court approved the provision of a sign-language interpreter for a student in a religious school. The Court did not insist that the interpreter be used only for the secular parts of the educational program; indeed, as the Court explained in *Agostini*, the Court in *Zobrest* expressly presumed that the interpreter would be used for "religious instruction." 521 U.S. at 226. Was that "diversion"? Similarly, in *Witters*, use of the aid was not restricted to secular aspects of the student's education. Respondents *assert* that the aid at issue there was "nondivertable" (Resp. Br. 28), but they do not explain how that could possibly be true. Mr. Witters wished to use the aid to pay for training in the ministry at a Bible college. If that is not "diversion," we do not know what is. Likewise, in *Allen*, the Court did not inquire about the actual classroom uses to which the secular textbooks were put, although it is obvious that even secular books can be used for religious teaching. Thus, if respondents were correct, *Allen* would have come out the other way. Based on respondents' examples, one can only conclude that they use the term "nondivertable" to describe all forms of aid that this Court has approved, with no more consistency than that.

B. Respondents' Subsidiary Arguments

Perhaps aware that their proposed two-part test is unsupportable under this Court's decisions, respondents offer a host of subsidiary arguments of uncertain provenance and force. For example, they suggest that the Court could distinguish between aid that is "for primary use of parochial school teachers" (Resp. Br. 22) and aid that is primarily used by students. Respondents do not explain, however, why the forms of aid at issue in this case would be unconstitutional under that standard. By their nature, computers, software, and library books are primarily used by individual students. Indeed, if textbooks—a central part of classroom instruction—satisfy this standard (as respondents concede (*id.* at 23)), computers, software, and library books must be constitutional *a fortiori*.

In any event, we are dubious that judicially administrable lines can be drawn between aid that "benefit[s] the student" and aid that benefits the "religious school enterprise." Resp. Br. 25. As even the decisions relied upon by respondents acknowledge, "a

meaningful distinction cannot be drawn between equipment used on a collective basis and that used individually." *Wolman*, 433 U.S. at 249 n.16. Most forms of aid—including buses, textbooks, and programs of remedial instruction—benefit *both* the school and the student.

At another point in their brief, respondents say the line should be drawn between aid to the "core educational functions" of the school and aid that is "supplemental" (citing the examples of buses, school lunches, health services, deaf translation services, and—inexplicably—textbooks). Resp. Br. 35. But this does not explain why the Court in *Agostini* approved the Shared Time program in *Ball*, which included remedial and enrichment reading and mathematics, as well as art, music, and physical education. See 473 U.S. at 388 ("Shared Time instructors are teaching academic subjects in religious schools in courses virtually indistinguishable from the other courses offered during the regular religious schoolday."). Nor does it explain *Witters*, where the payments covered the entire educational experience. Nor does it explain *Agostini*, except on the elitist assumption that remedial education is dispensable. Moreover, if textbooks are supplemental (as respondents aver (Resp. Br. 35)), there is no reason to think that computer software or library books are not. Computer programs and texts are simply two different media for presenting the same sorts of information. There is no pedagogical or constitutional reason for distinguishing between them.[7]

Respondents purport to distinguish *Agostini* and *Zobrest* on the ground that those cases involved public school teachers, who can be trusted to remain secular. Resp. Br. 28, 29, 31. (Respondents

[7] Respondents' treatment of "deaf translation services" as "supplemental" further exposes a deep conceptual confusion in their position. Deaf translation services, like computers, are simply tools that enhance the ability of students to learn from a course. Both are "supplemental" in the sense that they are not the essential core of teaching. Neither is "supplemental" in terms of its importance to the student's ability to learn. Respondents never explain why these services fall on opposite sides of the constitutional line. The label "supplemental" seems to be a substitute for analysis.

seem untroubled by the fact that in *Zobrest*, the Court presumed that the interpreter would *not* refrain from communicating religious messages.) They imply that teachers grounded in religious principles would be "confused" or "tempted" to use Chapter 2 equipment for nonstatutory purposes, and then to cover up their violations by filing false reports on its use.[8] Not only is this theory based on an insulting stereotype unsupported by the record, it is also inconsistent with *Witters*, *Regan*, and *Allen*. In each of those cases, the aid went to educational activities under the control of religious school teachers, without the involvement of public personnel. If respondents are right, *Witters*, *Regan*, and *Allen* must have been wrong.

Moreover, respondents misconceive the constitutional concern, which is not that *private school teachers* might engage in religious "indoctrination," but that the *government* might do so. See *Agostini*, 521 U.S. at 224 ("Because the only *government* aid in *Zobrest* was the interpreter, who was herself not inculcating any religious messages, no *government* indoctrination took place and we were able to conclude that 'the provision of such assistance [was] not barred by the Establishment Clause'") (emphasis and brackets in original) (quoting *Zobrest*, 509 U.S. at 13). There is no more need to worry that Chapter 2 materials are used in connection with classes conducted by religious school teachers than there was to worry that the interpreter in *Zobrest* was used in connection with the same sorts of classes conducted by the same sort of teacher.

[8] This case is unlike *Lemon* (see Resp. Br. 19-20), where in return for salary subsidies the religious school teachers undertook to refrain from incorporating any elements of religious or moral teaching into their classes. See Pet. Br. 28. Here, the religious school teachers agree only that they will use the Chapter 2 equipment for permitted purposes and keep honest records of its use. There is no reason to suppose that they will "inevitably experience great difficulty" in complying with those straightforward requirements. *Lemon*, 403 U.S. at 618. Nor is this program analogous to the Community Education program in *Ball*, on which respondents rely (at 27). There, the state gave hiring preferences to religious school teachers, which violates the dictates of neutrality.

In any event, this case does not involve subsidies to religious school teachers, but the provision of secular, neutral, and nonideological equipment and materials. This Court has never held that resources of this sort may not be provided unless they are "controlled and used by public employees." Resp. Br. 23-24. The two cases in which the provision of such materials was held unconstitutional, *Meek* and *Wolman*, rested on the broader "no aid" rationale that such resources cannot be provided to religious schools *at all*—regardless of whether public employees were involved. We have already shown that this absolutist "no aid" theory cannot be squared with precedent before or after those cases. See Pet. Br. 38-43, 45-46.

Respondents also rely heavily on a supposed constitutional rule against aid that "supplants" the efforts of the nonpublic school. Resp. Br. 29-30. Here again, however, they do not relate their theory to the facts of this case. Chapter 2, like Title I, contains a "supplement, not supplant" *statutory* requirement. 20 U.S.C. § 7371(b). If respondents think the Secretary has failed to enforce this rule, they are welcome to raise the issue in an appropriate forum. But since the statutory safeguard against supplantation is exactly the same here as it was in *Agostini* (and is enforced through exactly the same procedures (see Pet. Br. 26)), it is difficult to see how this program could be struck down on that ground without implying that *Agostini* was wrongly decided.[9]

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[9] We explained in our opening brief (at 26 n.16) that the "supplement, not supplant" idea is not a constitutional requirement, and that adopting it as such would lead to confusion. We urged this Court not to impose any such requirement in this case, where it could not affect the outcome. Respondents' response only confirms that our analysis is correct. They cite two sources of authority for the supplantation "rule." The first, *Ball*, has been overruled in relevant part. The Shared Time program in *Ball* plainly was not confined to courses that the schools would not otherwise provide, see 473 U.S. at 388, yet this Court approved that program in *Agostini*. The second, *Zobrest*, mentioned the fact that the school was not "relieved of an expense that it otherwise would have assumed in educating its students." 509 U.S. at 12. But the Court did not imply that this was a constitutional necessity. It was simply one point among many that distinguished earlier cases. Respondents offer no response to the numerous authorities that reject the nonsupplantation idea, or to our criticisms of its subjective and uncertain nature. See Pet. Br. 26 n.16; see also *Ball*, 473 U.S. at 396 ("The distinction between courses that 'supplement' and those that 'supplant' the regular curriculum is * * * not nearly as clear as petitioners allege").

C. Respondents' Ultimate Conclusion

Respondents claim that once these various lines and distinctions are recognized, the resulting jurisprudence will be "reveal[ed]" as "coherent." Resp. Br. 14. But in fact, all respondents have done is to add three or four new epicycles to an already Ptolemaic theory of the First Amendment. The result is a regime that simply makes no sense. Consider the conclusions that respondents derive from their various tests:

- If certain material is supplied on a printed page to students at nonpublic as well as public schools, this is constitutional. But if exactly the same material is supplied on a CD-ROM, it violates the First Amendment.

- If a public school teacher provides a program of mathematics drills to help slower students understand the material, this is constitutional, even if students at nonpublic schools are included. But if exactly the same math drills are presented by means of a computer program, it violates the First Amendment.

- If multiple copies of books like *The Grapes of Wrath* or *The Life of Albert Einstein* are supplied to students for use in the classroom as an assigned text, this is constitutional. But if fewer copies of the same books are provided for students to check out of the nonpublic school library, this violates the First Amendment.

We submit that distinctions of this sort have absolutely no basis in any coherent theory of constitutional law.

In *Agostini*, this Court set forth a reasonable set of constitutional criteria that avoid such inconsistency. Those criteria should be applied.

II. RESPONDENTS' VIEW THAT STUDENTS ATTENDING RELIGIOUS SCHOOLS MUST EITHER BE DENIED OTHERWISE AVAILABLE PUBLIC BENEFITS, OR THEIR SCHOOLS MUST BE FORCED TO SECULARIZE, IS A FALSE DILEMMA.

To their credit, respondents go beyond their tortured reading of this Court's cases and offer a reason why children attending religious nonpublic schools should be denied the benefits of otherwise neutral educational programs: it is for their own good.[10] According to respondents, there are two possible choices. Either students attending religious schools must suffer discrimination in the distribution of educational benefits (respondents' preferred result), or they may receive such benefits only if their schools secularize their educational offerings. This, respondents say, is their "great fear": that "state aid will be a tool that will secularize the teaching of most subjects in parochial schools." Resp. Br. 33.

Setting aside whether respondents have *standing* to raise concerns about purported negative effects on *our* children and *our* schools,[11] the answer to their fears is quite simple: this is a false

[10] In addition, respondents attempt (at 16-17) to ground their proposed constitutional rule in history—an attempt in which *amicus curiae* Baptist Joint Committee joins at greater length. This attempt fails for precisely the reason we stated in our opening brief (at 35-36): the Virginia experience, on which they rely, is strong evidence that the framers of our Establishment Clause disapproved of funding religion, qua religion, even if the subsidies were extended neutrally to all denominations. But it does not follow from this experience that the framers would have disapproved of funding *education* (or other public services that have a secular purpose) in ways that are neutral between religious and nonreligious participants. This case is not about targeting public money to religion; it is about targeting public money to education, and being neutral about religion.

[11] *Flast* v. *Cohen*, 392 U.S. 83, 87 (1968), grants taxpayer-plaintiffs standing to claim that they are injured by payment of "compulsory taxation for religious purposes." But *Flast* does not permit taxpayers to claim that receiving government benefits harms *religious schools* or threatens to interfere with *their* autonomy. There is no "logical link" or

dilemma. Nothing in the text, history, or purposes of the Establishment Clause suggests that when citizens or organizations receive their fair share of neutrally available public benefits, they must be forced to secularize their own activities. To be sure, the Establishment Clause prohibits the government from expending money for religious purposes; it prohibits targeting public subsidies to religious groups, discriminating in their favor, or endorsing their messages; and it prohibits the government itself from promoting religion by supplying materials or personnel that advance indoctrinating messages. But the Establishment Clause does not require the government to discriminate against religious citizens or religious institutions, and it does not require private persons or private groups to secularize their own speech as the price of receiving equal treatment. *Rosenberger* v. *Rector of Univ. of Va.*, 515 U.S. 819 (1995). Indeed, such an interpretation creates unnecessary conflicts with the Free Speech and Free Exercise Clauses of the same Amendment. *Id.* at 839; see Pet. Br. 43-45.

The "crucial difference," this Court has explained, is "between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Board of Education* v. *Mergens*, 496 U.S. 226, 250 (1990). The *Agostini* criteria respect this "crucial difference" by permitting government aid that is neutral among the various types of education that

"nexus" between respondents' claim of financial harm as taxpayers and their claim that religious schools will be required to secularize their curricula if permitted to participate in Chapter 2. See *id.* at 102; cf. Resp. Br. 34 (conceding that respondents' "driving concern in bringing this lawsuit" was "a concern for the spiritual health of religious schools"). Only participating religious schools (or their students) could be harmed by such requirements, and only they have standing to challenge them. See *Flast*, 392 U.S. at 102 (plaintiffs must establish "a nexus between [their status as taxpayers] and *the precise nature of the constitutional infringement alleged*") (emphasis added); *Valley Forge Christian College* v. *Americans United for Separation of Church & State*, 454 U.S. 464, 481 (1982) (noting "the rigor with which the *Flast* exception to the *Frothingham* [v. *Mellon*, 262 U.S. 447 (1923),] principle ought to be applied"); see also Pet. Br. 28 n.19.

families might choose for their children, while prohibiting any "governmental indoctrination" that might take place. There is no constitutional warrant for interfering with "private indoctrination," which is another word for free speech.[12] As Professor Douglas Laycock has explained, "The government must be neutral both in its own speech and in its treatment of private speech. It may not take a position on questions of religion in its own speech, and it must treat religious speech by private speakers exactly like secular speech by private speakers." Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech By Private Speakers*, 81 NW. U. L. REV. 1, 3 (1986).

Respondents warn darkly that if children attending religious schools can receive Chapter 2 educational benefits, their schools may forfeit their ability to hire and fire faculty, and to admit students, in light of religious criteria. Resp. Br. 32. But they do not explain why this would follow from the provision of computers, software, and library books, when it did not follow from the provision of textbooks, bus rides, school lunches, or

[12] The mere fact that a private organization receives government assistance does not make its speech or conduct "state action." *Rendell-Baker* v. *Kohn*, 457 U.S. 830 (1982). For the religious speech or conduct of a private organization to be attributed to the state, the government must have encouraged or endorsed that speech or conduct in some way; the receipt of neutral assistance under neutral criteria does not suffice. *Id.* at 841; see *Agostini*, 521 U.S. at 226 ("the IDEA's neutral eligibility criteria ensured that the interpreter's presence in a sectarian school was a 'result of the private decision of individual parents' and [could not] be attributed to *state* decisionmaking") (emphasis in original) (quoting *Zobrest*, 509 U.S. at 10); *Amos*, 483 U.S. at 337 ("For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence") (emphasis in original).

remedial education. Chapter 2 has been in operation for almost 35 years, and respondents' fears have never materialized.[13]

The fact is that religious schools, like others, are subject to a wide variety of government regulations regardless of whether their students receive aid. See *Pierce* v. *Society of Sisters*, 268 U.S. 510, 534 (1925) (affirming "the power of the state reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship be taught, and that nothing be taught which is manifestly inimical to the public welfare"); *Runyon* v. *McCrary*, 427 U.S. 160 (1976) (applying racial anti-discrimination laws to private schools). If respondents' "no aid" view were accepted, religious schools would be subject to neutral and generally applicable regulations, but excluded from neutral and generally available benefits. To be sure, as private organizations, nonpublic schools may assert a First Amendment defense to some forms of regulation as interferences with their freedom of speech, freedom of expressive association, and free exercise of religion. But these constitutional rights are not forfeited merely because such schools receive generally available public benefits.

As we have shown, it is possible for students at religious schools to receive public educational aid so long as the aid is evenhandedly distributed, secular, neutral, and nonideological in character, and provided in a form that does not lead to excessive entanglement. It is not necessary that the schools secularize their curriculum in order for their students to be eligible for Chapter 2 aid. Given their professions of concern for the right of religious schools to retain their religious character (Resp. Br. 1 & n.1, 33 n.173, 34-35), and their recognition that religious students and

[13] In fact, the right of religious schools to consider religious factors in hiring and firing is protected by statute, and is wholly independent of whether they receive public aid. Section 702 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1, exempts all religious organizations from the prohibition against religious discrimination in employment. See generally *Corporation of Presiding Bishop* v. *Amos*, 483 U.S. 327 (1987).

their schools already receive extensive aid of various sorts under programs that even respondents agree are constitutional (*id.* at 29, 35), one would think respondents would agree with us that the receipt of aid should not "require a religious 'cleansing' of classes where government equipment was operated" (*id.* at 33). They appear to agree that such a requirement would be undesirable. We can only wonder, then, why they argue in favor of it.

* * * * *

At bottom, this is not a difficult case. The decisive shifts in Establishment Clause doctrine came about in *Mueller*, *Witters*, and *Zobrest*, and were recognized and expressed in doctrinal terms in *Agostini*. Nothing more is required here than application of those principles. Moreover, the program at issue has been with us, in slightly different forms, from the days of President Lyndon Johnson. It has been reenacted and reaffirmed by many Congresses and Presidents of both parties. It does not involve any radical or untried ideas. Its educational benefits are well known. Four years of discovery by respondents failed to uncover any serious problems with its administration. Constitutional validation of this program will enable school officials to go about their business of educating students without a multiplication of legal obstacles, will enable legislatures to make more reliable judgments about constitutional limits in this area, and will enable children at religious schools to share on an equal basis in the innovative educational opportunities Congress desires to extend to all schoolchildren.

CONCLUSION

For the foregoing reasons, and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

MICHAEL W. MCCONNELL
STEFFEN N. JOHNSON
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

PATRICIA A. DEAN
Counsel of Record
ANDREW T. KARRON
JOHN C. MASSARO
Arnold & Porter
555 12th Street, N.W.
Washington, D.C. 20004
(202) 942-5000

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